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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

TWITTER, INC.,

Plaintiff,

v.

MATTHEW G. WHITAKER, Acting Attorney General of the United States, *et al.*,

Defendants.

Case No. 14-cv-4480-YGR

TWITTER'S OPPOSITION TO GOVERNMENT'S RESPONSE TO ORDER TO SHOW CAUSE

Date: February 15, 2019
Time: 9:30 a.m.
Courtroom 1, Fourth Floor
Judge: Hon. Yvonne Gonzalez Rogers

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INTRODUCTION

Running roughshod over fundamental separation-of-powers principles and the judiciary's role as a co-equal branch of government, the Government contends that the Court has no role to play in determining whether private counsel may access classified information in litigation—even after the *Executive* has made a general determination that the same counsel may be entrusted with top secret classified information.

The authority to grant access to classified information to a counsel who has been found eligible to hold the requisite security clearance falls comfortably within both the inherent and congressionally conferred powers of Article III courts to control discovery in order to ensure a just administration of the parties' case. And contrary to the Government's claim that an order of disclosure in the absence of Executive Branch consent would be "unsupported by law," the courts that have considered this precise question have consistently rejected the Government's attempts to bar access to evidence in judicial proceedings based solely on an Executive determination that opposing counsel has no "need-to-know" the classified information. *See Horn v. Huddle*, 647 F. Supp. 2d 55, 65 & n.18 (D.D.C. 2009); *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 595 F. Supp. 2d 1077, 1089 (N.D. Cal. 2009).

Indeed, the Government's position would present an unprecedented incursion by the Executive Branch into the province reserved to the courts by Congress and the Constitution, and raise fundamental concerns under the separation of powers. The Government's authorities either address wholly different questions (*e.g.*, *Egan* and *Dorfmont*, which address a court's ability to review an Executive Branch decision about a person's suitability for a security clearance) or, like *Stillman*, actually support Twitter's position that a court may compel production of classified materials to cleared private counsel under certain circumstances. The Executive Branch has no veto authority to prevent an Article III court from issuing a discovery order compelling the disclosure of classified material to a private counsel with the requisite security clearance. Simply put, "[t]he deference generally granted the Executive Branch in matters of classification and national security must yield when the Executive attempts to exert control over the courtroom." *Horn*, 647 F. Supp. 2d at 65–66.

The Court can and should exercise its broad discretion to control discovery as necessary to achieve "justice between the parties" and grant to Twitter's cleared counsel access to the core facts underlying the Government's impingement on its First Amendment rights. Principles of due process, as well as interests in preserving the integrity of the judicial fact-finding process and "achiev[ing] a just adjudication of the controversy between the parties," require—to the maximum extent practicable without creating a genuine risk of harm to national security—"full exposure of the relevant facts." *United States v. Meyer*, 398 F.2d 66, 75 (9th Cir. 1968); *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 983 (9th Cir. 2012). Indeed, the Ninth Circuit has held that disclosure of classified material to private counsel with appropriate security clearance does "not implicate national security when viewing the classified material because, by definition, he or she has the appropriate security clearance." *Al Haramain*, 686 F.3d at 983.

Alternatively, the Classified Steinbach Declaration ("Classified Declaration") may be discoverable here because it is not properly classified. Though Twitter obviously cannot know the Classified Declaration's content, Dkt. No. 145, the Court's description of that document as containing only "generic" and "boilerplate" descriptions of the "mosaic theory," Dkt. No. 172, at 18—a topic widely discussed in the public domain—suggests that the document does not meet the criteria for classification set forth in Executive Order 13526. Twitter thus requests that the Court exercise its authority to review the propriety of the Government's decision to classify the Classified Declaration. A finding that the Classified Declaration is improperly classified would dispose of any need for Twitter's counsel to possess a security clearance in order to view that document, and thus avoid the need even to address the Government's "need-to-know" objection.

Finally, the Government has indicated that, even if the Court rejects the Government's need-to-know objection, the Government may claim that the Classified Declaration is a state secret and must therefore be altogether excluded from evidence. While, as noted above, the Court's description of the Classified Declaration suggests that it may not be properly classified at all, much less constitute a state secret, this issue is not ripe until the Government formally asserts such a privilege. Accordingly, Twitter does not address that potential invocation of privilege

here, except to note that Twitter will vigorously contest any assertion of the state secrets privilege. That being said, Twitter does not object to giving the Government an opportunity to complete its state secrets review process—if it can do so quickly—before the Court makes any final determination regarding Twitter's right to access the Classified Declaration. And if the Government does invoke the state secrets privilege, Twitter respectfully requests an opportunity to respond to the Government's privilege claim.

RELEVANT PROCEDURAL HISTORY

The record before the Court reveals the Government's current objection to Twitter's request for access to the Classified Declaration for what it is—a litigation tactic that is divorced from any *bona fide* national security concern. In September 2016, Twitter filed a Motion for an Order Directing Defendants to Initiate Expedited Security Clearance for Twitter's lead counsel. Dkt. No. 124. In that motion, Twitter explained that it was seeking security clearance because it was highly foreseeable—given the subject-matter of this litigation—that in the future it might be necessary for Twitter's counsel to review classified material in order to effectively represent Twitter in this litigation. *Id.* at 2–3. While that motion was pending, the Government moved for summary judgment, Dkt. No. 145, and voluntarily lodged into evidence the Classified Declaration by then-FBI Executive Assistant Director Michael Steinbach, *see* Notice of Lodging of Classified Declaration, Dkt. No. 144. The Government argued that the Classified Declaration (along with an unclassified submission) demonstrated that its 2014 denial of Twitter's request to publish aggregate data regarding its receipt of national security process did not violate Twitter's First Amendment rights.

On July 6, 2017, the Court denied the Government's motion for summary judgment and granted Twitter's request that the Government be ordered to begin an expedited security clearance process. Dkt. No. 172. In denying the Government's subsequent motion for reconsideration, the Court specifically confirmed that it had "reviewed EAD Steinbach's declarations, both the public and the *in camera* submission, and found them to be insufficient and too generic to support the Government's restrictions on publication of Twitter's Draft Transparency Report." Dkt. No. 186, at 7.

Consistent with the Court's July 2017 Order, Twitter's lead counsel, Lee H. Rubin, completed a Questionnaire for National Security Positions, and the Government proceeded to conduct a background investigation to determine Mr. Rubin's eligibility for a security clearance. Dkt. No. 250-1, at ¶ 2. On September 17, 2018, DOJ's Litigation Security Group informed Mr. Rubin via email that the Government's assessment of his suitability to hold a security clearance had been "favorably adjudicated." *Id.* at ¶ 3. DOJ informed Mr. Rubin that the Government nevertheless would *not* grant Mr. Rubin a security clearance unless "the government's attorneys" determined that Mr. Rubin has a "'need-to-know' the particular classified information in this case." Dkt. No. 250-1, at ¶ 3.

The Government has consistently taken the position that Twitter's counsel has no "need-to-know" any of the classified information in this case, regardless of its conceded relevance to Twitter's claims. *See, e.g.*, Fourth Updated Joint Case Management Statement, Dkt. No. 244, at 9 ("[I]rrespective of [the] favorable determinations on Counsel's background investigation, [Twitter]'s counsel ha[s] no 'need-to-know' any of the classified information either sought in discovery or previously submitted by the Government to this Court"); Dkt. No. 175-1, at ¶ 18 ("[E]ven if plaintiff' counsel were to obtain a favorable suitability determination, I have determined that they do not have a need for access to or a need-to-know the classified FBI information at issue in this case. This includes the Government's classified, *in camera*, *ex parte* submission to the Court").

While Mr. Rubin's security clearance application was under consideration, the parties proceeded through unclassified discovery, which took the better part of a year. By the conclusion of unclassified discovery in November 2018, it became apparent that the Government did not intend to produce anything of substance in response to Twitter's requests for basic discovery into the reasons for the Government's classification of its draft Transparency Report. Instead, the Government has claimed that all documents related to this issue—which lies at the

heart of the First Amendment inquiry—are classified, privileged, or both.[1]

In light of the Government's near-blanket refusal to produce any information—classified or unclassified—regarding its reasons for classifying Twitter's draft Transparency Report, coupled with the Government's continued assertion that the Classified Declaration conclusively resolves Twitter's as-applied challenge, *e.g.*, Dkt. No. 256, at 10, Twitter notified the Court at the November 26, 2018 case management conference of its intent to request access to the Classified Declaration. 11.26.18 Tr. at 8–9, 16–17. Twitter filed a Notice of Request and Request for Access to the Classified Declaration on December 5, 2018. Dkt. No. 250. On December 17, 2018, the Government filed a 20-page brief informing the Court that it intended to initiate the internal Department of Justice process for potential invocation of the state secrets privilege and arguing that, irrespective of the outcome of DOJ's state secrets deliberations, Twitter's counsel should not be given access to the Classified Declaration. Dkt. No. 256. On January 2, 2019, the Court issued an Order to Show Cause Re: Disclosure of Declaration Submitted *In Camera*. Dkt. No. 261. For the reasons set forth below, the Government's response to the Court's Order to Show Cause, Dkt. No. 264—which largely repeats arguments the Government made before the Court issued its Order to Show Cause—provides no legally cognizable basis for denying Twitter access to the Classified Declaration.

ARGUMENT

A. The Court Has Authority to Compel Production to Cleared Counsel of Material the Government Has Deemed Classified.

1. The Court's Authority to Compel Disclosure of Classified Information to Counsel Whom the Executive Has Found Suitable to Review Such Information Stems from the Court's Inherent Authority and Separation of Powers.

The Government's position that the Executive Branch has exclusive authority to determine if a private litigant may have access to classified material relevant to ongoing litigation is fundamentally at odds with separation-of-powers principles and the Court's inherent

[1] Twitter's motion challenging certain of the Government's privilege designations, Dkt. No. 258, is currently pending before the Court, but further proceedings on that motion have been stayed during the government shut-down, Dkt. No. 262.

authority to fairly and justly adjudicate litigants' claims. Federal courts have inherent power to control litigants' "access to the courts," *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1082 (9th Cir. 2010) (en banc) (quotation marks omitted), to "adjudicate claims of violation of individual constitutional rights," *Meshal v. Higgenbotham*, 804 F.3d 417, 433 (D.C. Cir. 2015),[2] and to make any order "necessary to the exercise of [these and other powers]," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (implied power are those "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others"; they "'result to our Courts of justice from the nature of their institution'" (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812))). "[A] district court's inherent powers [include] the 'broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial.'" *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992) (quoting *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980)). That inherent authority is exercised through a district court's wide latitude to manage discovery, which is conferred under the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and other acts of Congress. *United States v. W.R. Grace*, 526 F.3d 499, 512 (9th Cir. 2008); *Sablan v. Dep't of Fin. of Commonwealth of N. Mariana Islands*, 856 F.2d 1317, 1321 (9th Cir. 1988) ("Discovery requests, however, are similarly committed to the sound discretion of the trial court."); Fed. R. Civ. P. 26(b)(1).

The Executive cannot usurp the courts' deeply rooted authority to manage discovery and the fact-finding process by claiming that the Executive has made an unreviewable decision that counsel has no "need-to-know" the information at issue. The need-to-know requirement turns *not* on delicate assessments regarding the individual's suitability to be entrusted with classified material, but solely on whether counsel requires access to the information in order to "perform or

[2] Though the Court here acts with the concurrent authority of the Constitution and Congress, the Supreme Court has suggested that the authority to resolve "colorable constitutional claim[s]" is so firmly vested in the judiciary by the Constitution, that a construction of the Administrative Procedure Act as "deny[ing] any judicial forum for a colorable constitutional claim" would raise a "serious constitutional question." *Webster v. Doe*, 486 U.S. 592, 603 (1988).

assist in a lawful and authorized governmental function." EO 13526, § 6.1(dd).[3] The Government's apparently categorical judgment that counsel in civil litigation against the Government never "need" classified discovery to perform a "governmental function" seeks improperly to appropriate to the Executive branch decision-making power over a function vested by the Constitution (and Congress) in the judiciary. The Executive's discretion is "not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987).

Consistent with this fundamental separation-of-powers principle, the Ninth Circuit in *Al-Haramain* specifically recognized federal courts' authority to order discovery of classified information, observing that disclosing classified material to "a lawyer with security clearance to view the classified information" would not implicate national security "because, by definition, he or she has the appropriate security clearance." 686 F.3d at 983; *accord Doe v. Gonzales*, 386 F. Supp. 2d 66, 71 (D. Conn. 2005) (holding that counsel should be given opportunity to seek security clearance, "so that [plaintiff's counsel] can review the *ex parte* classified evidence … without compromising the secrecy of classified materials").

And Judge Walker in this District *granted* access to classified materials to plaintiffs' attorneys whom the government had "found … suitable for top secret/secure compartmented

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[3] The "need-to-know" restriction on access to classified material derives from Executive Order ("EO") 13526, § 4.1(a), 75 Fed. Reg. 707, 720 (Dec. 29, 2009), which provides:

> (a) A person may have access to classified information provided that:
>
> (1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee;
>
> (2) the person has signed an approved nondisclosure agreement; and
>
> (3) the person has a need-to-know the information.

Id. The EO defines a "need-to-know" as "a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." EO 13526, § 6.1(dd).

information ('TS/SCI') clearances." *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 700 F. Supp. 2d 1182, 1191 (N.D. Cal. 2010), *vacated on other grounds by Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 855 (9th Cir. 2012); *see also* Order at 3, *In re Nat'l Sec. Agency Telecomms. Records Litig.*, No. MDL. 06-1791VRW (N.D. Cal. Feb. 13, 2009), ECF No. 562 (ordering government to comply with Court's prior order and instruction that it take any steps "necessary to afford that both parties have access to the material upon which the court makes a decision" (quotation marks omitted)).[4] The court did so over the very same objection that the Government has asserted here—that "plaintiffs' attorney did not 'need to know' the information that the court had determined plaintiffs[']attorneys would [in fact] need in order to participate in the litigation." *Id.* When the government refused to comply with the court's order, the court sanctioned the government by resolving the "liability component of plaintiffs' claim" against defendants and granting plaintiffs' motion for summary judgment. 700 F. Supp. 2d at 1191–92, 1202.

The Northern District of Ohio issued a similar order in *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010), holding that if "declassification or summarization of classified information is insufficient or impossible," plaintiff's counsel should "obtain an adequate security clearance to view the necessary documents … *in camera*, under protective order, and without disclosing the contents to [its client]." *Id.* ("The government will then provide KindHearts' counsel with an opportunity to respond to these documents (through a closed, classified hearing if KindHearts' counsel views classified information)."); *see also Roule v. Petraeus*, No. C 10–04632 LB, 2012 WL 2367873,

[4] The Ninth Circuit vacated the district court's subsequent "determination that § 1810 waives sovereign immunity" and its judgment awarding liquidated damages, attorneys' fees, and costs to the plaintiffs on that ground. *Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 855 (9th Cir. 2012). Though this mooted the district court's prior rulings on access to classified materials, the Ninth Circuit's opinion left undisturbed the lower court's earlier rulings regarding courts' authority to control discovery. *E.g.*, *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 595 F. Supp. 2d 1077 (N.D. Cal. Jan. 5, 2009) (granting plaintiffs' discovery motion seeking to expedite security clearance and for access to classified materials).

at *5 (N.D. Cal. June 21, 2012) (opining that none of the government's cited authorities actually preclude discovery of classified information in civil litigation).

Finally, in *Horn v. Huddle*, *supra*, the court found it "beyond dispute" that courts have "to play a role in the handling of classified information, at least in the context of litigation." 647 F. Supp. 2d at 62. Further, the court observed that the "ability to order … information disclosed in litigation" when a claim of privilege is denied, is necessarily part and parcel of the court's authority to "evaluate" the propriety of the government's privilege claim, and to hold otherwise would render the court's "evaluation" of the privilege claim a "mere[] … academic exercise." *Id.*[5] Indeed, it is axiomatic that federal courts have inherent authority "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and this authority has consistently been found to preclude Executive claims that its privilege assertions or other objections to disclosure are "conclusive on the courts," *Nixon v. Sirica*, 487 F.2d 700, 714–15 (D.C. Cir. 1973) ("To leave the proper scope and application of Executive privilege to the President's sole discretion would represent a mixing, rather than a separation, of Executive and Judicial functions."). The Government's suggestion here that its "need-to-know" determination is conclusive on this Court in the context of discovery, or that the Court lacks the power to *act* on any rejection of that objection, fails for the same reason as the Government's demands for absolute discretion have failed in other contexts. *See Horn*, 647 F. Supp. at 65–66 & n.18.

Further confirming the Court's authority to grant classified discovery in this setting is the D.C. Circuit's recognition that courts have numerous "special procedures and mechanisms" at their disposal in civil cases to "accord [national security interests] appropriate respect without abdicating [courts'] constitutional duties to adjudicate claims of violation of individual constitutional rights"—including the "security clearances of counsel and court personnel."

[5] Shortly after this opinion issued, Horn agreed as part of a settlement to withdraw the motion that had precipitated the court's order on classified information. *Horn v. Huddle*, 699 F. Supp. 2d 236, 237–38 (D.D.C. 2010). Though the court granted the government's accompanying motion to vacate, it specifically observed that "[s]ince the … opinions have already been published in the Federal Supplement, the only consequence of an order vacating them is the possibility that they may be considered somewhat less persuasive when the vacating order appears with the citation. [But] *[t]he reasoning is unaltered* …." *Id.* at 238 (emphasis added).

Meshal v. Higgenbotham, 804 F.3d 417, 433 (D.C. Cir. 2015) (recognizing potential need for classified discovery in the context of a *Bivens* action brought by plaintiff alleging violation of his Fourth and Fifth Amendment rights); *see also In re Sealed Case*, 494 F.3d 139, 154 (D.C. Cir. 2007) (observing that it would be "appropriate" to allow classified discovery in civil actions alleging constitutional claims under the "protective measures" set forth in the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 4).

2. The Government Has Offered No Contrary Authority.

The Government seeks to distinguish Twitter's abundant authority establishing a trial court's power to order disclosure of classified information to a cleared private counsel by arguing that in none of those cases was classified information ever produced. But that is so either because the government was willing to be held in contempt, *see In re Nat'l Sec. Agency Telecomms. Records Litig.*, 700 F. Supp. 2d at 1191, or because the government somehow mooted the discovery dispute (*e.g.*, by settling the case), *see Horn*, 699 F. Supp. 2d at 238; discussed *supra*, n.5. The Government's repeated success in avoiding the force of orders requiring the disclosure of classified information says nothing about the Court's *authority* to compel classified discovery and everything about the Government's commitment to preserving its ongoing ability to claim that such classified discovery has never occurred.

Nor has the Government offered any authority that would support denying Twitter's counsel access to the Classified Declaration. It relies on cases involving challenges by former employees to the government's termination of their employment after revoking their security clearances. *Egan*, for example, addressed only the "narrow question" of whether the Merit Systems Protection Board (the "Board") had authority "to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse [employment] action." *Dep't of Navy v. Egan*, 484 U.S. 518, 520 (1988). The Court concluded that Congress had conferred no authority on the Board to second-guess a terminated government employee's unfavorable security clearance adjudication. *Id.* at 530–31. Emphasizing that a security clearance decision "is only an attempt to predict [the plaintiff's] possible future behavior and assess whether, under compulsion of circumstances or for other reasons, he might

compromise sensitive information," the court reasoned that "[p]redictive judgment[s] of this kind must be made by those with the necessary expertise in protecting classified information." *Id.* at 529. *Dorfmont v. Brown* extended *Egan* to judicial review of a Department of Justice decision to revoke an employee's security clearance and then terminate her for hiring a felon serving a life sentence as a computer programmer. 913 F.2d 1399, 1400, 1403 (9th Cir. 1990).

But neither case held that the Executive has unreviewable discretion to make security clearance determinations in all circumstances. Indeed, *Dorfmont* specifically recognized that federal courts *have* jurisdiction to "entertain colorable constitutional challenges to security clearance decisions." *Id.* at 1403–04; *accord Webster v. Doe*, 486 U.S. 592, 602–03 (1988) (court had jurisdiction to review constitutional claims predicated on the CIA's determination that an employee's homosexuality "presented a security threat" and was grounds for revocation of the employee's security clearance (and termination)).

And in any event, Twitter is not challenging the aspect of the security clearance determination that was at issue in *Dorfmont* and *Egan*. The plaintiffs in those cases were found ineligible to access classified information; here, the Government has determined that Mr. Rubin *can* be entrusted with top secret classified information (the so-called "suitability determination"). *See* Dkt. No. 250-1, Ex. A, at 1 (application for determination of eligibility under EO 13526 § 4.1(a)(1) has been "favorably adjudicated"); *cf.* Ghattas Decl., Dkt. No. 175.1, ¶ 12 (describing the "'suitability' determination"). The Government's sole objection is that counsel does not "need-to-know" the information in the Classified Declaration "to perform or assist in a lawful and authorized governmental function," EO 13526 § 6.1(dd). *See* Response, Dkt. No. 264, at 9–10 (confirming that Mr. Rubin's security clearance is being denied solely on the basis of the Government's "need-to-know" determination). But the Government's finding that Twitter's counsel has no "need-to-know" is not based on any particular individualized and inherently subjective judgment about the susceptibility of Twitter's counsel to pressure or "compulsion" to disclose classified information (*see Egan*, 484 U.S. at 528). Nor does the Government have any particular expertise about Twitter's needs in this case. Rather, the Government's need-to-know objection is a mechanical and categorical determination that private counsel in a civil proceeding

never have the "need to know" classified information, regardless of its content or importance to the case.[6] The Supreme "[C]ourt has not looked favorably upon broad assertions by the United States that certain subject matters are off-limits for judicial review." *In re Sealed Case*, 494 F.3d at 151. Indeed, even *Reynolds*, decided "at the height of the Cold War" permitted the plaintiff's claims to proceed. *Id.*[7]

The task of balancing a litigant's need for evidence against a governmental objection to disclosure is a quintessentially judicial function. Whatever the Executive's appropriate degree of autonomy over decisions regarding whether or not *its own* employees have a "need-to-know" classified information, for the reasons discussed above, separation-of-powers principles preclude the Government's attempt to interpose its "need-to-know" assessment as a barrier to *in camera* discovery of classified materials, under a protective order, by properly cleared counsel.

3. Even the *Stillman* Framework Favored by the Government Recognizes the Authority of Courts to Grant, and the Potential Utility of Granting, Cleared Counsel Access to Classified Discovery.

The Government's objection is particularly puzzling given its ongoing effort to have this case proceed under *Stillman*, which itself specifically contemplates that the Court may grant cleared counsel access to classified information—at least as long as the Court has *first* reviewed the classified submission *ex parte* and *in camera*. The court of appeals could not have been clearer:

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[6] Any attempt by the Government to claim that DOJ's need-to-know conclusion in this case is based on some case-specific assessment is belied by both the text of EO 13526 and the Government's position that "a private party has no role to play in [the] court's assessment of the Government's explanation of national security harms." Dkt. No. 256, at 10.

[7] And the U.S. Supreme Court has found jurisdiction to review far more sensitive questions than the one presented here—to wit, the Executive's classification of a military captive of war as an "enemy combatant." In finding that due process requires U.S. citizens being held as enemy combatants be given a meaningful opportunity to contest the factual basis for their detention, Court has also noted the "unconventional nature" of the "war on terror," which makes its "national security underpinnings … broad and malleable." *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004). In refusing to capitulate to the government's appeals for absolute discretion, the Court emphasized its obligation to "preserve our commitment at home to the principles for which we fight abroad," even in times of "ongoing combat." *Id.* at 532.

> [W]e remand this case to the district court to determine first whether it can resolve the classification ex parte….If [it can]not, then the court should consider whether its need for such assistance outweighs the concomitant intrusion upon the Government's interest in national security. Only then should it decide whether to enter an order granting [plaintiff's counsel] access to the manuscript and, if similarly necessary, to the Government's classified pleadings and affidavits.

Stillman v. CIA, 319 F.3d 546, 548–49 (D.C. Cir. 2003); *cf.* Defendants' Response to Court's November 26, 2018 Order, Dkt. No. 256, at 12 (quoting this aspect of *Stillman*). Indeed, the *Horn* court read *Stillman* as specifically authorizing courts to order cleared counsel be granted access to information the government "claims … [is] 'classified.'" 647 F. Supp. 2d at 61 (proceeding under step two of the *Stillman* framework).

Twitter submits that *Stillman* is incorrect to the extent it suggests that classified information can be disclosed to cleared private counsel only if the district court determines that it cannot decide the classification issue on its own (and is likely incompatible with the Ninth Circuit's approach in *Al-Haramain*, *see infra*, at p. 14). Nevertheless, *Stillman* squarely confirms that a court has the inherent authority to order the government to produce classified information to a cleared plaintiff's counsel in a First Amendment challenge to the government's classification of information.

B. An Order Granting Twitter's Request for Disclosure of the Classified Declaration to Twitter's Counsel Would Be an Appropriate Exercise of the Court's Broad Discretion to Make Discovery Rulings that Serve the Interests of Justice.

1. Interests of Justice, Access to Courts, and Due Process Favor Granting Twitter's Request for Access to the Classified Declaration, Subject to Any Protective Measures the Court May Deem Appropriate.

The balance of interests here strongly supports the Court's exercise of its broad discretion to grant Twitter's counsel access to evidence the Government has placed at the center of this case—by submitting the Classified Declaration as its central piece of evidence in support of summary judgment—and an opportunity to participate in any *in camera* proceedings relating to the presentation or use of the classified information. On Twitter's side of the balance, Twitter's due process rights, along with interests in judicial integrity and open access to courts, favor granting Twitter's motion.

The Ninth Circuit has held that access by cleared counsel to classified information provides "undeniable" value to all parties involved, as counsel "may be able to clear up errors"

that would otherwise go "uncorrected despite potentially easy, ready, and persuasive explanations." *Al Haramain*, 686 F.3d, at 982–83. "*[I]n camera* inspection" by its very nature "precludes the adversarial testing on which judicial decisionmaking relies," *Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 n.2 (9th Cir. 1997), and "seriously distorts the traditional adversary nature of our legal system," *Wiener v. F.B.I.*, 943 F.2d 972, 977 (9th Cir. 1991). "It is simply 'unreasonable to expect [even the most meticulous] trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.'" *Id.* (quoting *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973) (*In camera* review "deprive[s] [the court] of the benefit of informed advocacy to draw its attention to the weaknesses in the withholding agency's arguments.")). In short, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights," *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995) (quoting *Joint Anti–Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring)), and thus "the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error," *id.*

Thus, in *Al-Haramain*, the Ninth Circuit recognized a "due process right[]" to "mitigation measures" (specifically contemplating the "provi[sion] [of] an unclassified summary *or* access by a lawyer with the proper security clearance") where the government has failed to show "that any such measure would … implicate[] national security" or otherwise impose an undue burden on the government. 686 F.3d at 983–84 (finding that the government's failure to "pursue potential mitigation measures violated [the plaintiff's] due process rights"); *accord In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1079 n.17 (N.D. Cal. 2013) (citing *Al-Haramain* for the proposition that "defense counsel who have secured an appropriate level of security clearance" should be granted access to classified information "to the extent practicable … in order to minimize any due process concerns."). Judge Walker similarly found that *ex parte* resolution of the plaintiffs' constitutional claims under the FISA "would deprive plaintiffs of due process." *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 595 F. Supp. 2d at 1089 (due process required counsel be "granted access to the court's rulings and, possibly, to at least some of the defendants'

classified filings"), *judgment vacated on other grounds by Al-Haramain v. Obama*, 705 F.3d at 855; *see supra*, n.4.

Likewise, in *Abourezk v. Reagan*, the D.C. Circuit reversed the trial court's entry of summary judgment for the government where the court had relied nearly exclusively on the government's *ex parte* submission of classified information to justify its denial of plaintiffs' visa applications, as the government's public submissions were "entirely conclusory." 785 F.2d at 1047, 1060–61. The court reasoned that exceptions to the "firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions …. are both few and tightly contained," and are effectively limited to (1) challenges under Exemption 1 of the Freedom of Information Act ("FOIA"), (2) circumstances when one party "asserts an evidentiary privilege" and the court must decide whether "*to prevent use* of the materials in the litigation" altogether, or (3) the government makes a valid state secrets claim. *Id.* a 1060–61 (emphasis in original) (citing *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983)) ("Only in the most extraordinary circumstances does our precedent countenance court reliance upon *ex parte* evidence to decide the merits of a dispute").

As in *Abourezk*, the Government's public submissions here are entirely "conclusory." *See, e.g.*, Order on Summary Judgment, Dkt. No. 172, at 17–18; Order on Motion for Reconsideration, Dkt. No. 186, at 7. The Government has effectively refused to provide any discovery whatsoever into its reasons for restricting Twitter's speech. Moreover, as in *Abourezk*, the Government seeks summary judgment in its favor on the basis of *ex parte*, *in camera* submissions of classified information over which no valid claim of privilege has been made. Twitter's due process interests in classified discovery is certainly heightened where, as here, cleared counsel seeks access to discrete evidence that the Government has made central to its justification for imposing a prior restraint on speech.

On the other side of the ledger, the Government has failed to identify any cognizable, countervailing bases for denying disclosure. The Government points to *Al-Haramain*'s acknowledgment that the Government may sometimes "have a legitimate interest in shielding [classified] materials from someone even with the appropriate security clearance." Dkt. No. 264,

at 15 (quoting *Al-Haramain*, 686 F.3d at 983 (suggesting this might be the case, if, for example, disclosure imposed an undue burden on the government)). But the Government has identified *no* such "legitimate" interests here. Generalized concerns regarding the risk of inadvertent disclosure that flows every time a new person is permitted to access any kind of classified material is insufficient. That argument proves too much—as such risk (if accepted as sufficient) would *always* preclude access.

Nor does the nature of the Classified Declaration suggest that disclosure would be "unduly burdensome." *Al-Haramain*, 686 F.3d at 983. Though Twitter cannot know the content of the Classified Declaration, the Court's descriptions of the document as "generic" and "seemingly boilerplate," Dkt. No. 261, at 2, appear to belie any claim that the content of the Classified Declaration is so sensitive that the disclosure to an additional person with a top secret-level clearance poses a sufficiently grave risk to national security so as to preclude access.[8]

In short, the balance of interests weighs heavily in favor of granting Twitter's cleared counsel access to the Classified Declaration, and the Court would be well within its authority to compel disclosure of the Classified Declaration to Twitter's counsel under an appropriate protective order.

2. In the Alternative, Disclosure of the Steinbach Declaration Is Appropriate Because It Is Not Properly Classified.

In the alternative, a finding that the Classified Declaration is not properly classified would obviate the need to resolve whether the Government may bar Twitter's access to the Classified Declaration based solely on an adverse "need-to-know" determination.

[8] On this point, the Government appears to misapprehend the import of the Court's description of the Classified Declaration in the Order to Show Cause. *See* Dkt. No. 264, 1–4. As Twitter understands the Court's Order, the Court has not conflated questions about the national security sensitivity of the Classified Declaration itself with its prior conclusion that the Classified Declaration did not carry the Government's constitutional burden to justify its restriction on publication of Twitter's draft Transparency Report. The Court was simply observing that the generic content of the Classified Declaration not only failed to support the Government's suppression of Twitter's speech under governing First Amendment standards, but also likely rendered it ineligible for protection as a state secret (or even as classified information).

In order to be properly classified, a document must meet four "conditions" under EO 13526, § 1.1. The information must also meet the subject-matter requirements in Section 1.4, which provides that information is properly classified only if "its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security" *and* the information "pertains to one or more" of seven categories. *Id.* § 1.4. These categories include "(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology"; and "(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security." *Id.*

As in FOIA cases, the Government bears the burden of demonstrating proper classification by submitting affidavits describing "the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld" actually meets the standards for classification in EO 13526. *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987); *Elec. Frontier Found. v. CIA*, 2013 WL 5443048, at *5 (N.D. Cal. Sept. 30, 2013) ("*EFF*").[9]

In defending its classification of the Classified Declaration, the Government will likely claim that its classification determinations are subject to utmost deference by the Court. But courts (including this District) have cautioned that, "[b]efore giving the agency's expert opinion on national security matters the substantial weight to which it is entitled, a district court must ensure that it has an adequate foundation to review the agency's withholding claims." *EFF*, 2013 WL 5443048, at *4; *King*, 830 F.2d at 227 (same). That courts have an important role to play in the review of Executive classification decisions is confirmed by Congress's conferral of *de novo* review on courts reviewing classification claims under FOIA Exemption 1, 5 U.S.C. § 552(b)(1). As the D.C. Circuit has observed, in enacting FOIA's statutory scheme, "Congress required the courts to take a fresh look at decisions against disclosure as a check against both

[9] As this Court has recognized, the question of whether a document (like the Classified Declaration) is properly classified is wholly distinct from the question of whether a platform like Twitter—"a social media outlet that functions as an information broadcast medium more akin to a newspaper or television network"—has a First Amendment right to publish its draft Transparency Report. Dkt. No. 172, at 14, 19–20.

intentional misrepresentations and inherent biases," as even "good faith interpretations" by an agency responsible for protecting the national security (e.g., the CIA) "are likely to suffer from the bias of the agency." *Ray v. Turner*, 587 F.2d 1187, 1210 (D.C. Cir. 1978).

For all these reasons, courts have not been timid about rejecting classification as a basis for withholding relevant evidence where the government's submissions fail to demonstrate the material was properly classified. *King*, 830 F.2d at 66, 73, 77 (reversing summary judgment because DOJ's affidavits failed to "describe with reasonable specificity the material withheld, and identify the damage to national security expected to attend its disclosure" as necessary to show the documents were "properly classified" and therefore lawfully withheld under FOIA Exemption 1).

In *EFF*, Judge Armstrong rejected the government's "submissions a[s] inadequate" to justify the withholding of certain documents the government claimed were classified under Executive Order 13526. 2013 WL 5443048, at *6–7 ("boilerplate" index discussing elements of EO 13526 but failing to explain *why* disclosure would "damage the claimed interest" sought to be protected lacked "sufficient detail and specificity to allow the Court to decide whether the redacted information is properly classified under EO 13526"); *see also id.* at *8–9 (same conclusion as to DAIG submission); *and id.* *10–11 (same as to FBI). Based on these findings, the court ordered the government to "release the information that the Court has not determined was properly withheld or provide satisfactory supplemental [] indices and declarations that address the deficiencies" within 60 days. *Id.* at *26.

Though Twitter cannot know the content of the Classified Declaration, the Court's repeated descriptions of that document as containing primarily "generic" and "boilerplate" descriptions of the mosaic theory—about which information is widely available in the public domain—suggest that the Government may not be able to meet its burden to establish that disclosure of the Classified Declaration would "cause identifiable or describable damage to the national security," as required by EO 13526, §§ 1.1, 1.4.

Twitter thus respectfully requests that the Government be put to its burden of showing that the Classified Declaration is properly classified. And if it cannot do so, Twitter respectfully

requests that the Court order disclosure of that Declaration (or any portions that are not properly classified) to Twitter without the restrictions that would be required for review of classified information.

C. Though the Government Should Have an Opportunity to Complete Its State Secrets Review Process in an Expeditious Manner, any Ultimate Claim of State Secrets in this Case Would Be Wholly Inappropriate and a Misuse of the Doctrine.

Given both the Court's description of the Classified Declaration as "generic" and "boilerplate" and the Government's prior reliance on the Classified Declaration *in this litigation*, Twitter would strenuously object to any attempt to characterize information in the Classified Declaration (much less the entire declaration) as a "state secret." As conceived by the Supreme Court and the Ninth Circuit, the common-law doctrine excludes evidence only where *any* use of that evidence to litigate the merits of a claim—including *in camera* and subject to a protective order—would nevertheless pose such an intolerable "danger … [of] expos[ing] matters which, in the interest of national security, should not be divulged," that the evidence must be wholly excluded from the case. *Jeppesen*, 614 F.3d at 1081. Plainly no such threat is present here, where the Government has voluntarily submitted and relied on the evidence at issue in the underlying merits proceeding. And the fundamental character of the evidence does not change simply because cleared counsel is seeking access to it.[10]

Nonetheless, this issue is not ripe for review until the Government formally asserts the privilege. *Cf. id.* at 1080 (privilege may be invoked only via a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal

[10] Indeed, the Government appears to improperly treat the state secrets doctrine as a trump card to hold and play if other appeals for deference to its judgment are ineffective. Particularly troubling is the Government's implicit threat that it could have invoked the privilege earlier in these proceedings (*i.e.*, in lieu of submitting the Classified Declaration) as a means to block even the limited inquiry the Court has been able to conduct to date into the constitutionality of the Government's restriction on Twitter's speech. *See, e.g.*, Dkt. No. 256, at 11 n.6 (threatening that an order compelling disclosure of classified material to cleared counsel would pose "a severe disincentive … for sharing classified information with courts to begin with"). That argument only highlights the Executive's apparent willingness to invoke the doctrine to avoid inconvenient judicial oversight and underscores the need for searching judicial scrutiny of any state secrets claim the Government may make.

consideration by that officer" (quoting *United States v. Reynolds*, 345 U.S. 1, 7 (1953))). Accordingly, Twitter respectfully requests that this Court set a deadline for the Government to complete its consideration and submit a formal state secrets claim (if any) and supporting affidavits. The deadline should be set for as soon as possible and no later than March 17, 2019—which would be 90 days from the Government's formal request for "60 to 90 days" to "complete [its] consideration of whether" to perfect a claim of state secrets privilege over the Classified Declaration. Dkt. No. 256, at 16.[11]

Should the Government invoke state secrets over the Classified Declaration, Twitter requests that the Court set a briefing schedule to give Twitter an opportunity to respond to such claim.

CONCLUSION

In sum, Twitter respectfully requests that the Court (a) overrule the Government's objections to the Court's authority to compel production of the Classified Declaration; (b) determine whether the Classified Declaration is indeed properly classified; and (c) set a deadline of no later than March 17, 2019 for the Government to decide whether to assert a claim of state secrets privilege over the Classified Declaration.

[11] As it concedes in its Response to the Court's Order to Show Cause, the Government has been on notice that Twitter might seek access to classified material, including the Classified Declaration, since the date Twitter filed a Motion for an Order Directing Defendants to Initiate an Expedited Security Clearance Process for Plaintiff's Counsel. Dkt. No. 124; *see also* Dkt. No. 133 (Opposition to Security Clearance Motion) (recognizing as much).

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